UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL Petitioner, v. ERHARD MAHNKE, Respondent, and CITY OF WINOOSKI COMMUNITY DEVELOPMENT DEPARTMENT, Respondent.	DOCKET NUMBER CB1216910004T1 DATE: APR 23 1992

Stephen S. Blodgett, Esquire, Burlington, Vermont, for Respondent Mahnke.

William M. O'Brien, Esquire, Winooski, Vermont, for Respondent City of Winooski Community Development Department.

Leslie K. Lubell, Esquire, and Heidi Weintraub, Esquire, Washington, D.C., for Petitioner.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a complaint for disciplinary action filed by the Special Counsel charging Respondent Mahnke with violating the Hatch Political

Activities Act, (Hatch Act) 5 U.S.C. § 1502(a)(3).[1] Specifically, the complaint alleges that Mr. Mahnke participated in a partisan election when he was a candidate for alderman in Burlington, Vermont while principally employed by the City of Winooski's Community Development Department, a federally funded activity. Vol. 1, Tab 1. The Chief Administrative Law Judge (CALJ) assigned to the case found that preponderant evidence established a violation and warranted removal. Respondent Mahnke has filed timely exceptions to the Recommended Decision and Special Counsel has filed a timely response. For the reasons set forth below, the Board hereby ADOPTS AS MODIFIED the CALJ's Recommended Decision and incorporates it into this final decision.

ANALYSIS

The 1990 election for alderman in Burlington, Vermont was partisan and respondent Mahnke violated 5 U.S.C. § 1502(a)(3) by his participation.

A state or local officer or employee is precluded by 5 U.S.C. § 1502(a)(3) from being a candidate for elective office. Nonpartisan candidacies, however are excepted from this rule by 5 U.S.C. § 1503. Section 1503 states as follows:

> Section 1502(a)(3) of this title does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such

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[1] Section 1502 provides:

(a) A State or local officer or employee may not-

* * *

(3) be a candidate for elective office.

> election as *representing* (emphasis added) a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

The issue here is whether any of the candidates in the Burlington, Vermont election for alderman were "representing" a party within the meaning of 5 U.S.C. § 1503. In *Special Counsel v. Yoho*, 15 M.S.P.R. 409 (1983), *overruled on other grounds*, *Special Counsel v. Purnell*, 37 M.S.P.R. 184 (1988), *aff'd sub nom. Fela v. U.S. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989), the Board found that candidates for election of School Board Director were "representing" a party within the meaning of section 1503 where the designation "Democrat" or "Republican" appeared next to a candidate's name on the general election ballot.[2] Neither the fact that a state statute provided for a nonpartisan election nor the stipulated neutrality of the Republican and Democratic parties as to all candidates was viewed as material. Accordingly, the Board found that Yoho had participated in a partisan election in violation of 5 U.S.C. § 1502(a)(3).

Similarly here, the name of one of respondent Mahnke's opponents, Maurice F. Mahoney, Jr., appeared on the ballot for Alderman with the designation "Democratic" beside his name. Vol. 1, Tab 10, P-9. Accordingly, Mr. Mahoney may be

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[2] In *Purnell* the Board held that the preponderance evidentiary standard, rather than the "clear and convincing" evidentiary standard applied in *Yoho*, is applicable to the factual issues relevant to imposition of the removal penalty.

viewed as "representing" the Democratic party within the meaning of 5 U.S.C § 1503. Thus, the CALJ correctly found that the aldermanic election was partisan and that Mr. Mahnke violated section 1502(a)(3) by his participation.

Mr. Mahnke asserts the CALJ erred because Vermont law establishes that the election was nonpartisan.[3] R.E. 2. *Yoho* found, however, that a state statute creates only a rebuttable presumption that an election for a particular office is nonpartisan. *Yoho*, 15 M.S.P.R. 409, 411-412. Where, as here, the designation "Democratic" appears on the ballot next to the name of one of the candidates, the presumption of nonpartisan status is rebutted and the election is partisan. *See id.*

Moreover, an examination of Vt. Stat. Ann. tit. 17, § 2681a (1982), the statute in question, supports a finding that the election here was partisan.[4] Under this provision,

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[3] Mr. Mahnke requests that the Board make certain fact findings as set out in his trial brief. R.E. 2-4. Because the findings requested are immaterial to the outcome of this appeal we find it unnecessary to address them further.

[4] Section 2681a concerning local election ballots in pertinent part provides:

> (d) No political party or other designation shall be listed unless the municipal charter provides for such listing, the town has voted at an earlier election to provide for such listing or, in the absence of previous consideration of the question by the town, the legislative body decides to permit listing. If political party or other designations are permitted, no candidate shall use the name of a political party whose certificate of organization has been filed properly with the secretary of state unless the candidate has been endorsed by a legally called town caucus of that political party for the office in question. In

political party designations only appear on the ballot if the city or town has chosen to permit such a listing. Further, no candidate may use the name of a political party unless the candidate has been *endorsed* (emphasis added) by a legally called town caucus of that political party. Thus, the designation Democrat or Republican on the local election ballot indicates that party's support of the candidate. Accordingly, under the statute, a state or local officer or employee who receives the endorsement of the Democratic or Republican party may properly be viewed as representing that party.

Mr. Mahnke asserts, however, that endorsement by the Republican or Democratic party does not constitute "representing" a party within the meaning of 5 U.S.C. § 1503. That issue was resolved in *In re Broering*, 1 P.A.R. 778 (1955) which was followed by the Board in *Yoho*. In *Broering*, the Civil Service Commission held that the partisan nature of an election may be shown by the fact that the candidates are nominated or *endorsed* (emphasis added) by state or national political parties or the local political committee of such a State or national political party. Accordingly, Vermont law does not provide a defense to the Hatch Act violation in this case.

In a related argument, Mr. Mahnke asserts that the CALJ's interpretation of the term "representing" in 5 U.S.C.

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any event, the candidate must still file the petition and consent form required by section 2681 of this title.

§ 1503 is too broad and therefore inconsistent with the court's holding in *City of Buffalo, New York v. United States Department of Labor*, 729 F.2d 64 (2d Cir. 1984) that the prohibition on serving as a candidate for elective office be construed narrowly. R.E. 1. *Buffalo*, however, provides no support for Mahnke's argument.

In *Buffalo* the court did not address the issue of what constitutes a partisan election and thus the meaning of the term "represent" in 5 U.S.C. § 1503. Rather, the court examined the issue of what constitutes elective office under 5 U.S.C. § 1502(a)(3). The court found that an interim appointment was not an "election" under the Act. The court construed "election" narrowly based on its conclusion that the legislative history of the 1974 amendments to the Hatch Act showed congressional intent that section 1502(a)(3) be interpreted narrowly. While the scant legislative history of the 1974 amendments shows congressional desire to lessen the restrictions on the political activities of state and local officers and employees, there is no indication that Congress wanted to change the rule with regard to partisan elections as set out in *Broering*.[5] S. Conf. Rep. No. 1237,

[5] The determination of what constitutes a partisan election set out in *Broering* is consistent with earlier Civil Service Commission rules. See Hatch Act Decisions of the United States Civil Service Commission 47 (1949). Congress is presumed knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, (1988). Thus, if Congress had intended a change in the law one would expect that it would have made its intent explicit. *See St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541 (1978).

93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5618, 5669. Accordingly, Mr. Mahnke has failed to show that the CALJ incorrectly interpreted the term "representing" or that the CALJ incorrectly found the election partisan.

The penalty of removal is appropriate.

Once a violation of the Hatch Act has been established there are only two alternatives: removal or no penalty. *Special Counsel v. Suso*, 26 M.S.P.R. 673, 679-80 n.11 (1985). Whether removal is warranted will depend upon the seriousness of the violation, together with all mitigating and aggravating factors. *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom. Fela v. U.S. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989).

Contrary to Mr. Mahnke's exceptions, we find that the CALJ properly weighed the mitigating factors in finding removal appropriate.[6] Consistent with *Special Counsel v. Brondyk*, 42 M.S.P.R. 333, 337 (1989), the CALJ found that Mr. Mahnke's candidacy was a substantial and conspicuous infraction because it is a per se violation of the statute. That *Purnell* deemed coercion of political contributions the "most pernicious" of the Hatch Act violations does not, as

[6] Mr. Mahnke suggests that the CALJ's finding regarding his motive and intent was not complete. R.E. 4-5. He does not appear to disagree, however, with the CALJ's conclusion that the intent and purpose behind his candidacy was to retain his seat as alderman. Because we do not find this factor material to the outcome, we find it unnecessary to make the requested finding that his motive and intent could not have been financially self-serving.

Mr. Mahnke suggests, require finding that partisan candidacy is less than a substantial violation, especially where, as here, Mr. Mahnke openly and aggressively pursued his election bid after receiving a warning from the Special Counsel. *See Brondyk*, 42 M.S.P.R. at 337.

Mr. Mahnke contends, however, that mitigation is warranted because his decision to run was made in "good faith" based on advice from the city attorneys' offices of Winooski and Burlington, the affected municipalities. R.E. 6-7. Mr. Mahnke's mistaken belief that the Special Counsel's advice was incorrect and that the city attorneys' advice was correct provides no basis for mitigation under the circumstances of this case.

As the Board found in *Brondyk*, reliance on incorrect advice will not preclude imposition of the penalty of removal. *Id.* at 338-339; *see also State of Minnesota Department of Jobs & Training v. Merit Systems Protection Board*, 875 F.2d 179 (8th Cir. 1989)(reliance on erroneously decided federal district court case was not in good faith so as to preclude removal for violation of Hatch Act). That Mr. Mahnke's behavior was not as defiant as that of respondent Brondyk does not, as Mr. Mahnke argues, make *Brondyk* inapplicable. In both cases the respondents chose to ignore specific warnings from the Special Counsel, the agency authorized by Congress to issue authoritative advice on the Hatch Act. 5 U.S.C.A. § 1212(f)(West Supp. 1991); 5 C.F.R. § 1800.3.

Mr. Mahnke argues that the warning was insufficient because it did not specifically address the analysis of local election law made by the attorneys from the city attorneys' offices and provided to the Special Counsel. We find, however, that the warning was sufficient to put a reasonable person on notice of what constitutes a violation of the Hatch Act. Not only did the Special Counsel warn Mr. Mahnke that his 1988 candidacy for alderman violated the Hatch Act because he had participated in a partisan election, the letter also defined partisan election. While the Special Counsel declined to charge Mr. Mahnke with a violation for his 1988 candidacy due to his efforts to determine whether his candidacy was permissible, he was warned that should he again be a candidate for alderman neither he nor any of his opponents could be identified as a candidate of either the Democratic or Republican party. Finally, the Special Counsel invited Mr. Mahnke to contact its office if he had any questions. Vol. 1, Tab 10, P-4. Thus, it should have been clear to Mr. Mahnke that he risked prosecution if he chose to run in the 1990 alderman election. Yet, instead of contacting the Special Counsel for advice, he again contacted the local attorneys who had previously advised him that candidacy was permissible. Tr. 107, 123. He subsequently informed the Special Counsel that he had decided to run for reelection in the March 6, 1990, election for alderman in the city of Burlington. That he understood the risk is demonstrated by his statement to the

Special Counsel that "[i]f you determine that my candidacy does, in your opinion, violate the Act, then I would like an opportunity for a hearing before the Merit Systems Protection Board so that I can fully present my position." Vol. 1, Tab 10, P-5. Under these circumstances we agree with the CALJ that Mr. Mahnke's candidacy was not in good faith.

Mr. Mahnke, however, attempts to compare himself to the respondent in *Special Counsel v. Yoho*, 15 M.S.P.R. 409 (1983) who was not removed despite running in a partisan election after receiving a warning from the Special Counsel. *Yoho* is distinguishable. The issue in *Yoho* of whether an election is partisan where a person is permitted by state statute to cross-file as a Republican and Democrat was a novel issue with the Board. *Id.* at 411. Thus, the Board found that Yoho's reliance on the statute and a judicial interpretation of that statute was misplaced rather than a deliberate disregard for the Act. Further, the Board found no "political coloring" to the office of school board director where the Republican and Democratic parties remained neutral as to all of the candidates and no funds were sought or received from the political parties. Finally, Yoho expended no money on his campaign for office indicating a passive candidacy.

Here, following *Yoho* and *Special Counsel v. Sims*, 20 M.S.P.R. 236 (1984), the issue of what constitutes a partisan election is no longer novel. Thus, unlike *Yoho*,

Mr. Mahnke cannot claim simple misplaced reliance on state law and the advice of local attorneys, especially where that advice was provided by individuals inexperienced with Hatch Act matters.[7] Further, unlike *Yoho*, we find there was "political coloring" to the office of alderman where Mr. Mahnke's opponent, Mr. Mahoney, ran with the endorsement of the Democratic party. Finally, Mr. Mahnke ran a highly visible campaign in which he openly and aggressively solicited funds and votes, appearing on local radio and television and, on at least one occasion, discussed the issue of the Hatch Act. *Compare with Brondyk* (violation of Hatch Act in openly and vigorously campaigning for sheriff was substantial). Accordingly, we agree with the CALJ that Mr. Mahnke's violation of the Hatch Act was of such scope and effect as to warrant removal under 5 U.S.C. § 1505.

ORDER

Accordingly, if the City of Winooski Community Development Department does not remove respondent Erhard Mahnke within thirty (30) days of the date of this order, it

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[7] The January 31, 1986, written opinion of the Burlington Assistant City Attorney John Franco failed to mention the Hatch Act and the March 14, 1988, letter from the Winooski City Attorney to the Special Counsel simply concluded, based on the 1986 opinion, that the alderman election was nonpartisan. Vol. 1, Tab 10, P-3; Tab 19, R-3. Mr. Franco admitted to conducting less than "exhaustive" research on the topic. Tr. 114-115. The record does not reveal that the attorneys conducted any further research on either the Act or the Special Counsel's right to issue authoritative advice before orally advising Mr. Mahnke that his 1990 candidacy would not violate the Act. Tr. 100-118.

shall be subject to the sanction of a withholding of federal funds, as provided in 5 U.S.C. § 1506.

The Special Counsel is ORDERED to notify the Board within sixty days of this final decision whether respondent Mahnke has been removed from his position with the City of Winooski Community Development Department, unless respondent Mahnke is suspended and this decision is stayed in accordance with 5 U.S.C. § 1508. It is FURTHER ORDERED that, after the first submission, the Special Counsel shall thereafter submit to the Board, at three six-month intervals, evidence concerning whether or not respondent Mahnke has been reemployed by any state or local agency of the State of Vermont for a period of 18 months after the date of this order as provided by 5 U.S.C. § 1506.

Pursuant to 5 U.S.C. § 1508, the respondents are hereby notified of the right to file a petition for review in the United States District Court for the district in which respondent Mahnke resides within thirty days of the date of mailing of the Board's final decision.

This is the final order of the Merit Systems Protection Board.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.